The FCC and the New Millennium: Regulating the Internet in an Era of Deregulation

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I. Introduction

With the passage of the Telecommunications Act in 1996 (“1996 Act”), Congress stated “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” Although Congress’s statement appears simple enough, the so-called “Internet” has come to mean many different things to many people, and the interpretation of this once clear directive has become complicated. The Internet has evolved in ways not anticipated when Congress first passed the 1996 Act. For example, long distance and local telephone calls are now routed over the Internet, cable companies deliver Internet access in conjunction with traditional video programming, and wireless providers use their licensed facilities to make available anytime, anywhere access to e-mail, instant messaging, Internet web browsing and video.

As more traditional modes of regulated telecommunications converge with the Internet, the Federal Communications Commission (“FCC” or “Commission”) is confronted with increasingly frequent questions of whether to regulate newly developed hybrid services and, if so, how. Should the traditional regulatory framework governing cable, wireless, or telephony apply, or should these regulations be forsaken in the name of “the Internet?” Or, should we create a whole new regulatory paradigm for the Internet? Moreover, does Congress’s edict that the Internet remain free from regulation mandate the deregulation of any service incorporating the Internet or its underlying technology? And, how does the concept of “net neutrality” impact FCC policy-making and Congressional law-making?

The following article provides an overview of FCC regulation and its intersection with the Internet. While the FCC has taken a hands-off approach to the Internet and its predecessor, information services, the convergence of new technologies and traditional communications services has created the backdrop for a fascinating regulatory and policy debate, which remains ongoing and settled in only piecemeal fashion.

II. Back to the Future: The FCC’s Treatment of Enhanced Service Providers

Long before the advent of the Internet, and well before the 1996 Act, the FCC recognized that the growing interdependence of telephone and computer networks challenged traditional regulatory and policy assumptions. To encourage the growth and development of these new technologies, the FCC sought to insulate them from traditional regulatory intrusion. Over twenty-five years ago, the FCC created a regulatory “safe-harbor” that continues to influence today’s debate regarding the regulation of the Internet and colors Internet regulatory issues before today’s FCC.

In the early 1980s, in Computer II, the FCC established a fundamental distinction between “basic services” and “enhanced services.” The FCC defined “basic services” as “the common carrier offering of transmission capacity

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1 Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), Docket No. 20828, 77 FCC 2d 384 (1980) (“Computer II”). Prior to the 1996 Act, information services were referred to as enhanced services. As discussed below, these terms generally are interchangeable in meaning.
for the movement of information.”¹ Since a basic service transmits information generated by a customer from one point to another, without changing the content of the transmission, it represents the transparent transmission capacity of conventional communications services. Because the FCC considered “basic” services to be “wholly traditional common carrier activities,” such services were regulated under Title II of the Communications Act of 1934 (“Communications Act”).*

In contrast, the FCC defined “enhanced services” as: “services, offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information.”*¹ These enhanced services were, at the time, new, yet promising.

To encourage the marriage of telecommunications with computer technology, the FCC concluded in Computer II that the direct regulation of enhanced services generally was unwarranted because the market for those services was competitive. Thus, the FCC exempted enhanced service providers from paying interstate access charges, unlike long-distance voice providers. This exemption, according to the FCC, benefited consumers because it encouraged enhanced service providers to develop their services without the burden of “per minute” access charges imposed on basic service providers.

The broad applicability of Computer II forced the Commission to better define the delineation between basic and enhanced services. In the Centrex Order*, the FCC further limited its definition of enhanced services by determining that a variety of Centrex services should be regulated as basic common carrier services, despite a level of customer interaction with the switch to route or forward voice calls.⁵ Such services, the Commission decided, were “adjunct” to basic service and therefore should be regulated as a basic service, although they could not be classified as “pure” transmission services. Significantly, the FCC’s Centrex Order stated that a service will be considered an adjunct-to-basic service, and not treated as an enhanced service, if the service is: (1) intended to facilitate use of traditional telephone service; and (2) does not alter the fundamental character of telephone service, despite other characteristics that might classify the service as enhanced. Accordingly, “adjunct services” are treated as basic services, even if they fall within possible literal readings of the definition of enhanced services.⁶

To further define the line between basic and enhanced services, the FCC also developed the “contamination” theory. The contamination theory recognizes that most enhanced services utilize basic telecommunications services. Under this theory, where a single service contains both enhanced and basic service components, the enhanced component “contaminates” the basic component and, as a result, the entire “contaminated” service offering is treated as “enhanced.” Therefore, service providers that combine basic and enhanced services into a single offering are classified, for regulatory purposes, as enhanced service providers.⁷ The contamination theory, however, does not prohibit the FCC from regulating basic or adjunct-to-basic services. In the Frame Relay Order, the FCC explained that the contamination theory only explains how an enhanced service, provided over regulated facilities, continues to remain enhanced; despite the fact it utilizes basic transmission elements.⁸

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¹ Id. para. 5.
² Id. para. 131.
³ 47 CFR §64.702(a). Significantly, services that act on content but do not change their character or result in “no net protocol conversion” are not considered enhanced services.
⁵ The FCC also noted the following as examples of adjunct services provided in connection with basic services: call forwarding, speed dialing, directory assistance, itemized billing, traffic management studies, and voice encryption. The FCC also has identified call monitoring, caller I.D., call blocking, call return, repeat dialing, and call tracking as adjunct-to-basic services. Because these services do not change the nature of traditional telephone service, the FCC determined that they do not fall within the definition of an enhanced service.
⁷ Independent Data Communications Manufacturers Association, Inc. And American Telephone And Telegraph Company Petition for Declaratory Ruling, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, para. 45 (1995) (“Frame Relay Order”). The FCC has held that the contamination theory applies to non-facilities-based providers.

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III. Déjà vu All Over Again: The 1996 Act

In passing the 1996 Act, Congress did not change the FCC’s regulatory dichotomy of basic and enhanced services; however, the 1996 Act created an additional layer of complexity. The 1996 Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used.” The term “telecommunications” is defined as “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” In contrast, the 1996 Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”

The FCC first considered the relationship between its traditional basic/enhanced distinctions and the 1996 Act telecommunications/information service dichotomy in a proceeding establishing safeguards for the Regional Bell Operating Companies (“RBOC”) provision of interLATA services. In the Non-Accounting Safeguards Order, the FCC concluded that protocol processing services that had previously qualified as “enhanced” should be treated as “information services” under the 1996 Act because they satisfy the statutory requirements of offering “a capability for . . . transforming [and] processing . . . information via telecommunications.”

The FCC reinforced this conclusion in its April 10, 1998 Report to Congress on Universal Service by concluding that the categories of “telecommunications service” and “information service” contained in the 1996 Act are mutually exclusive and parallel the definitions of “basic service” and “enhanced service” developed earlier by the FCC.

The FCC’s Report to Congress illustrates its belief that Congress intended to maintain a framework that distinguished between telecommunications and information service providers. Moreover, the FCC concluded that information service providers are not subject to regulation as common carriers merely because they provide their service “via telecommunications.”

The 1996 Act and the development of a variety of new and advanced services further complicated the distinction between types of service offerings. New challenges included questions on how to classify service offerings: is it a telecommunications service, an information service, or perhaps something else? Moreover, what is the jurisdictional nature of the service: interstate and subject to the FCC’s rules; intrastate and subject to state regulation; or jurisdictionally mixed? As discussed below, the FCC has approached these questions on a case-by-case basis through the consideration of a variety of advanced hybrid services. Such decisions have sparked an ongoing legal and policy debate creating precedent and confusion for how the FCC regulates the Internet and other new advanced services.

IV. Easier Said Than Done: Challenges of Advanced Service Regulation

A. The Regulatory Classification of Advanced Services

1. If It Walks Like a Duck, Talks Like a Duck & Quacks Like a Duck: Voice Over the Internet

With the growth of the Internet, new technologies such as voice over Internet Protocol (“VoIP”) have risen in popularity. VoIP provides end-users with the opportunity to utilize less expensive data circuits to transmit two-way telephone conversations. VoIP technology leverages both the Internet and the computer processing power of gateways. Because early VoIP providers did not seek telecommunications licenses, did not pay access charges, and did not contribute to the Universal Service Fund, such providers enjoyed a significant cost advantage over traditional regulated carriers. In order to neutralize that advantage, many traditional regulated carriers sought to achieve regulatory parity and maintain market share by asserting that VoIP is, by its nature, a regulated telecommunication service and not an information service.

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9 47 USC §153(43).
10 47 USC §153(20).
In 1996, for example, America’s Carriers Telecommunications Association filed a petition with the FCC asking the Commission to require VoIP providers to pay interstate access charges. The FCC requested comment on the petition but never issued a decision. Similarly, in April 1999, US WEST filed a petition with the FCC asking the Commission to require interstate phone-to-phone VoIP providers to pay originating and terminating access charges. US WEST did not press the matter, perhaps due in part to the Commission’s contemporaneous examination of its proposed merger with Qwest, and eventually withdrew the Petition.

Despite this pressure from industry, it was not until the FCC prepared its Report to Congress that it considered how to regulate VoIP. Casting a shadow on the characterization of certain “phone-to-phone IP telephony services as information services,” the FCC noted that they “instead bear the characteristics of ‘telecommunications services.’” Indeed, the FCC noted that VoIP service closely resembles traditional telephony. In particular, VoIP providers: hold themselves out as providing voice telephony or facsimile transmission service; do not require end-users to use equipment different from that necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network (“PSTN”); allow end-users to call telephone numbers assigned in accordance with the North American Numbering Plan and associated international agreements; and transmit end-user information without any net change in form or content. The FCC also noted that the VoIP providers did not appear to offer services resembling traditional enhanced services such as the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Accordingly, the FCC concluded that VoIP providers providing “telecommunications services” should be regulated as common carriers.

Despite these comments, the FCC concluded that it was premature to regulate phone-to-phone VoIP until establishing a complete record to examine these services. Therefore, the FCC’s Report to Congress preserved the classification of phone-to-phone VoIP as an unregulated information service, but “teed up” this service for future consideration.

2. FCC VoIP Petitions

As a result of this uncertainty and the significant growth of VoIP as a viable alternative to traditional phone service, a number of parties filed requests with the FCC requesting declaratory rulings involving VoIP services. To date, petitions have been filed by numerous service providers on issues concerning regulatory classification, intercarrier compensation, access to numbering resources, and other related issues. The FCC has taken final action

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15 In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of Public Switched Network by Information Service and Internet Access Providers, Notice of Proposed Rulemaking, CC Docket Nos., 96-262, 94-1, 91-213, 96-263, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354 (1996). In its Notice of Inquiry, the FCC expressly stated that it did not intend to address the “questions about whether some Internet-based services conceivably could be considered ‘telecommunications services’ under the 1996 Act.” Id. at 21480 n. 390.
16 Petition of US West for Declaratory Ruling Affirming Carrier’s Carrier Charges on IP Telephony, WC Docket No. 02-361 (filed Apr. 5, 1999).
18 In support of its tentative conclusion that computer-to-computer VoIP was an information service, the FCC stated that “Internet access providers do not offer a pure transmission path; they combine computer processing, information provisioning, and other computer-mediated offerings with data transport.” When using such services, the subscriber interacts with stored information and obtains additional, different or restructured information (in the form of web pages, FTP sites, e-mail and news servers etc.), so such services are readily classified as enhanced. Report to Congress, 13 FCC Rcd at 11536, para.73.
19 Id. at para. 83.
20 Id. at para. 88.
21 Id. at para. 89.
22 Report to Congress, 13 FCC Rcd at 11544, paras. 91-92. The Commission also noted “to promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology. Congress did not limit ‘telecommunications’ to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users.” Id. at para. 98.
23 Id. at para. 90.
on several of these petitions on various aspects of VoIP regulation, but numerous other petitions remain pending. While the issues presented in some of these petitions overlap, the petitions are summarized below into four categories: (1) petitions seeking rulings concerning regulatory classifications; (2) petitions seeking rulings concerning intercarrier compensation issues; (3) petitions concerning access to numbering resources; and (4) the petition concerning the application of the Communications Assistance with Law Enforcement Act (“CALEA”) to VoIP services.

(a) Petitions Seeking Regulatory Classifications

(i) Pulver.com Petition: The FCC’s order addressing the Pulver.com petition is the first instance in which the FCC conclusively determined the regulatory classification of any flavor of VoIP. In February 2003, Pulver.com filed a petition seeking a declaratory ruling that its Free World Dialup (“FWD”) service is neither a “telecommunications service” nor “telecommunications” under federal law. One year later, in February 2004, the FCC released its Order finding that pulver.com’s FWD offering is an unregulated information service subject to the FCC’s jurisdiction. The FCC specifically limited its finding to the FWD offering where Pulver.com facilitates free communication over the Internet between one online FWD member using a broadband Internet connection and other online FWD members also using broadband Internet connections. The FCC order does not apply to FWD communications that in any way involve communications that originate or terminate on the PSTN, or that may be made via dial-up Internet access.

Since FWD requires users to establish a broadband Internet connection through a third-party provider, the FCC found that Pulver.com neither offers nor provides transmission to its members. Further, the FCC determined that FWD provides new information to users including: whether other FWD members are online; at what IP address a member may be reached; or, in some cases, a voicemail or email response. While Pulver.com may “use” some telecommunications to provide its FWD directory service, the FCC concluded that this use does not make FWD itself telecommunications.

(ii) Vonage Petition: In September 2003, Vonage Holdings Corporation (“Vonage”) filed a petition with the FCC requesting that the agency preempt the order of the Minnesota Public Utilities Commission (“MN PUC”) requiring Vonage to comply with state laws governing providers of telephone service. While the Vonage Petition was pending at the FCC, Vonage and the MN PUC engaged in litigation concerning the jurisdiction of the MN PUC over Vonage’s VoIP services. In the Vonage Petition, Vonage requested that the FCC determine that certain specific E911 requirements imposed by the Minnesota PUC conflict with federal policies. Vonage asserted that preemption was necessary because of the impossibility of separating interstate and intrastate components of the Internet. Vonage also requested an FCC ruling that its computer-to-phone VoIP service is an information service, and subject to exclusive FCC jurisdiction. While the Vonage Petition was pending at the FCC, the United States District Court for the District of Minnesota ruled in Vonage’s favor. The MN PUC appealed to the 8th Circuit. Prior to 8th Circuit decision, in the Vonage Order, the FCC granted Vonage’s petition in part. In so doing, the FCC preempted the MN PUC, finding Vonage’s service to be an interstate service subject to exclusive FCC jurisdiction, but did not determine whether Vonage’s computer-to-phone VoIP service is an information or telecommunications service. The 8th Circuit subsequently upheld the District Court’s decision. The FCC’s Vonage Order currently is being challenged in the 8th Circuit by the States of Minnesota and New York, the Ohio Public Utility Commission and the National Association of Regulatory Utility Commissioners.

30 Minnesota Pub. Util. Comm’n v. FCC, Case Nos. 05-1069, 05-1122, 05-3114, 05-3118 (8th Cir) (filed on January 7, 2005). The California, New York and Ohio Commissions also filed petitions for review in the U.S. Courts of Appeals for the Ninth, Second and Sixth Circuits, respectively. The appeals will be consolidated and heard before the U.S. Court of Appeals for the Eighth Circuit.
(b) Petitions Concerning Intercarrier Compensation

(i) AT&T Petition: In October 2002, AT&T Corp. (“AT&T”) filed a petition with the FCC for a declaratory ruling that AT&T’s phone-to-phone VoIP service was exempt from PSTN access charges. According to AT&T, ILECs are attempting to impose access charges on AT&T’s phone-to-phone IP telephony services. In April 2004, the FCC unanimously denied AT&T’s Petition. In what Commissioner Powell described as a decision decided on “very narrow grounds,” the FCC attempted to tailor its decision to the specific service AT&T described in its Petition.

In the AT&T IP in the Middle Order, the FCC found that: (1) AT&T’s specific service offering is a telecommunications service; and (2) that access charges apply to the service. The FCC’s decision confirms that a service that “merely uses the Internet as a transmission medium without harnessing the Internet’s broader capabilities” will not be exempt from the access charge and other obligations that apply to other “telecommunications services.” The FCC did not make any determination as to whether its ruling could be applied retroactively to recover access charges for past time periods.

(ii) SBC Petition: After the FCC ruled in April 2004, that AT&T’s “IP in the middle” or phone-to-phone traffic is a telecommunications service subject to access charges, SBC brought several lawsuits to recoup access charges purportedly owed by other carriers that offered similar “IP in the middle” services. In the course of the litigation, the defendants responded that they are not interexchange carriers and that the matter should be referred to the FCC on primary jurisdiction grounds because the FCC was better positioned to resolve the “technical” issues involved. The court agreed and dismissed the various cases without prejudice, pending an FCC ruling.

In September 2005, SBC filed a petition seeking a number of declaratory rulings by the FCC. First, SBC sought a ruling that wholesale transmission providers using IP technology are interexchange carriers under FCC rule 69.5 (even if they consider themselves “Enhanced Service Providers,”) and are therefore obligated to pay access charges for “phone-to-phone” traffic. SBC also sought a ruling that least cost routers are “common carriers” subject to access charges if the transmission services they provide are indirectly available to the general public and that even private carriers are subject to access charges if they transport interexchange traffic “for hire.” Finally, SBC sought a ruling that the company’s access tariffs apply to any interexchange traffic originated or terminated on its loop facilities, even if the interexchange carrier routes the traffic over local trunks instead of switched access facilities.

While this proceeding primarily is aimed at the narrow issues involved in the litigation referenced above, any forthcoming FCC rulings on these questions could have broad ramifications for CLECs, retail VoIP providers, IXCs and other service providers. It currently remains pending with the Commission.

(iii) Grande Petition: In October 2005, Grande Communications, Inc. filed a petition for declaratory ruling regarding the treatment of traffic terminated through Grande to end users of interconnected local exchange carriers. The Grande Petition focused on the traffic routed to Grande by its customers that have certified that the traffic originated in IP format. Grande requested a declaratory ruling from the FCC that: 1) a local exchange carrier may rely on a customer’s certification that the traffic being sent originates in IP format at the calling party’s premises and therefore undergoes a net protocol conversion, or is otherwise enhanced, IP-enabled traffic; 2) a local exchange carrier may send such “certified” traffic to other terminating local exchange carriers over local interconnection trunks; and 3) terminating carriers that receive such traffic over local interconnection trunks must treat that traffic as local traffic for intercarrier compensation purposes, and may not assess access charges for that traffic. The petition remains pending with the Commission.

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31 Petition for Declaratory Ruling That AT&T’s Phone to Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361 (filed Oct. 18, 2002).

32 Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, Memorandum Opinion and Order, 19 FCC Rcd 7457 (2004) (“AT&T IP in the Middle Order”).

33 Petition for Declaratory Ruling That UniPoint Enhanced Services, d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges, WC Docket No. 05-276 (filed Sept. 21, 2005). VarTec Telecom and Frontier Communications also filed, and then withdrew, related petitions in this proceeding.

(c) Numbering Resources Petitions

(i) The California Public Utility Commission’s Overlay Petition: In October 2003, the California Public Utilities Commission (“CPUC”) filed a petition requesting delegated authority to implement two specialized area code overlays (“SOs”) covering the entire state of California. The CPUC requested authority to implement one area code over the Northern portion of the state and another over the Southern portion of the state. The new area codes would include all “non-geographic based” numbers, defined by the CPUC to include Automatic Teller Machines, VoIP service numbers, and Internet service provider access numbers. On September 9, 2005, the FCC granted the petition in part, allowing the CPUC to implement the SOs, and to require all numbers using VoIP services to utilize those area codes. A number of parties have filed petitions for reconsideration of the FCC’s order that could result in the modification of the FCC’s conclusions. However, the FCC has not yet acted on these petitions and the CPUC has taken no action yet to actually implement these SOs.

(ii) SBC-IS Numbering Petition, and Related Petitions: The FCC’s rules prohibit VoIP providers (unless they are also telecommunications service providers) from directly obtaining telephone numbers from the entities that control them—the North American Numbering Plan Administrator (“NANPA”) and the Pooling Administrator (“PA”). Thus, VoIP providers must obtain numbers indirectly through licensed telecommunications carriers. Several VoIP providers have petitioned the FCC for rulings allowing them to directly obtain numbering resources from the NANPA and the PA.

The first such petition was filed by SBC-Internet Services (“SBC-IS”) in July 2004. In February 2005, the FCC granted the SBC-IS Numbering Petition, permitting SBC-IS to apply directly to the NANPA and PA for numbering resources. This approval was set with a number of conditions, including a requirement that SBC-IS file number utilization and forecast reports with the FCC, file requests for numbering resources with the FCC and the relevant state commission 30 days prior to requesting numbers from the NANPA or the PA, and comply with other numbering utilization and optimization requirements imposed by the FCC, state commissions and industry guidelines. The FCC also is requiring SBC-IP to comply with the “facilities readiness” requirement imposed on carriers that request numbering resources. The FCC also has directed the North American Numbering Council (“NANC”) to review whether and how the FCC’s numbering rules should be modified to allow IP-enabled voice service providers access to numbering resources.

Following the grant of the SBC-IS Numbering Petition, a number of other VoIP providers, including, inter alia, Vonage, Nuvio, Pac-West Telecom and RNK sought similar treatment from the Commission. These carriers filed petitions similar to the SBC-IS Numbering Petition seeking substantively identical relief subject to the same conditions set by the FCC. The FCC, however, has not yet ruled on these “me-too” petitions.

(d) The CALEA Orders

(i) The First CALEA Order: In September 2005, the FCC released its first order concerning the applicability of CALEA to certain VoIP and broadband service providers and a notice of proposed rulemaking concerning the same. The First CALEA Order became effective November 14, 2005, and requires certain VoIP providers and facilities-based broadband Internet access providers to comply with CALEA by May 14, 2007. Under the First CALEA Order, facilities-based providers of broadband Internet access must comply with CALEA, regardless of their classification as an “information” service under the Telecommunications Act. Specifically, the FCC determined that CALEA applies to “interconnected VoIP services” meaning those VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN.

A group of VoIP providers, telecom associations and equipment manufacturers filed a petition for review of the First CALEA Order with the D.C. Circuit Court of Appeals on October 25, 2005, and requested the FCC stay the First CALEA Order pending that appeal. On June 9, 2006, the court upheld the First CALEA Order, allowing the FCC to apply the requirements of CALEA to interconnected VoIP and facilities-based broadband Internet access providers.\(^{40}\)

(ii) The Second CALEA Order: In May 2006, the FCC released a second order regarding the implementation of CALEA by providers of facilities-based broadband Internet access and interconnected VoIP providers.\(^{41}\) Among other things, the Second CALEA Order affirmed the May 14, 2007 compliance deadline, established reporting requirements for facilities-based Internet access providers and interconnected VoIP providers, and permitted covered providers to use “trusted third parties” to comply with CALEA. The Second CALEA Order also requires such providers to file a system security manual and a “monitoring report” advising the FCC on the status of their compliance.

3. A New Regulatory Framework? The FCC’s IP-Enabled Services Proceeding

In addition to the numerous above petitions filed with the FCC, the Commission has undertaken several rulemaking proceedings specifically aimed at the regulation of VoIP services. These proceedings began in 2004 with a generic Notice of Proposed Rulemaking (“NPRM”) aimed at obtaining information and proposals for regulation (or non-regulation) of “IP-Enabled Services.” Thereafter, in June 2005, the Commission issued an order requiring certain VoIP providers deploy enhanced 911 services.

(a) IP-Enabled Services NPRM

In March 2004, the FCC released the IP-Enabled Services NPRM,\(^{42}\) in which it launched a comprehensive examination of the appropriate regulatory treatment of IP-enabled services, including VoIP. In the IP-Enabled Services NPRM, the FCC requested comment on fundamental questions that will affect every aspect of IP-enabled services. The FCC indicated that IP-enabled services should only be minimally regulated, in light of the public interest in encouraging broadband infrastructure and greater customer choice. The IP-Enabled Services NPRM did not set forth proposed rules, but instead set forth general policy considerations and requested comments on those issues. Furthermore, at the outset of the IP-Enabled Services NPRM, the FCC recognized that VoIP services are not necessarily substitutes for traditional telephony services because IP networks are technically and administratively different from the PSTN. In general, the FCC is evaluating ways to regulate certain types of services, while leaving other types of services unregulated, such as pulver.com’s FWD service.

The IP-Enabled Services NPRM requested comments on a multitude of IP-enabled service issues. Among other issues, the FCC sought comment on: (i) how it should differentiate among IP-enabled services and how VoIP services should be categorized; (ii) the jurisdictional nature of IP-enabled services including whether the FCC’s end-to-end analysis traditionally used to assess the jurisdictional nature of calls is appropriate for all or certain categories of IP-enabled calls; and (iii) whether, and on what grounds, certain or all IP-enabled services should be subject to exclusive federal jurisdiction.

In terms of intercarrier compensation, the FCC stated its policy that any service provider that uses the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates or terminates on the PSTN, on an IP network, or on a cable network.

As VoIP services become more prevalent and grow in comparison with traditional switched voice traffic, the FCC’s characterization of VoIP as either a telecommunications service or an information service will become increasingly significant. Indeed, the FCC’s rulings in the IP-Enabled Services NPRM and the related petitions discussed above will be instrumental in determining the fate of VoIP services for years to come.


\(^{42}\) In the Matter of IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (“IP-Enabled Services NPRM”). A growing number of state public utility commissions have also opened proceedings to determine the regulatory classification of VoIP service. A discussion of those proceedings is beyond the scope of this article; nevertheless, the involvement of numerous state commissions in this debate only will further complicate the regulation of VoIP.
(b) The VoIP E911 Order

(i) Scope of the VoIP E911 Order: In June 2005, the FCC released its first order concerning VoIP E911 emergency service requirements. The VoIP E911 Order applies to “interconnected” VoIP services, defined as “those VoIP services that can be used to receive telephone calls that originate on the PSTN and can be used to terminate calls to the PSTN.” Although the Commission has not yet formally defined “VoIP,” it notes that, as used in the VoIP E911 Order, VoIP generally means “any IP-enabled service [] offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony.” The Commission identified several defining characteristics of interconnected VoIP providers (“IVPs”): (1) the service enables real-time, two-way voice communications; (2) the service requires a broadband connection from the user’s location; (3) the service requires IP-compatible customer premises equipment (e.g., terminal adaptors or personal computers); and (4) the service offering permits users generally to receive calls that originate on the PSTN and to terminate calls to the PSTN. As such, computer-to-computer VoIP and VoIP using dial-up access are exempt from the FCC’s VoIP E911 rules.

The FCC expressly stated that the VoIP E911 Order does not reach the regulatory classification issue of whether VoIP services are “telecommunications” or “information” services. Instead, the Commission relied on its ancillary authority under Title I of the Communications Act, as well as its plenary numbering authority under Section 251(e) to impose E911 requirements on IVPs. If such services are later deemed to be “telecommunications services,” the FCC said it would have additional authority under Title II of the Communications Act to support the VoIP E911 rules.

Through the VoIP E911 Order, the FCC required all IVPs, within 120 days of the effective date of the Order (November 28, 2005), to transmit all 911 calls, as well as call back number and the caller’s Registered Location for each call, to the Public Safety Answering Point (“PSAP”) or other designated emergency authority that serves the caller’s Registered Location. Such calls must be routed through dedicated wireline E911 networks (including through selective routers where used), with automatic number information (“ANI”) or pseudo-ANI (“pANI”).

The VoIP E911 Order also required all interconnected VoIP providers to submit a letter to the FCC detailing their compliance with the E911 rules within 120 days after the effective date of the Order (November 28, 2005). Hundreds of IVPs filed reports on that date, most of which stated that they had relied on third-party providers for VoIP E911 solutions given the expansive rollout requirements of the Order. Most nomadic or mobile IVPs reported that they had been unable to reach 100% compliance with the VoIP E911 Order by that date. Numerous IVPs also filed for limited waivers of the VoIP E911 rules. The FCC has not yet acted on any of those waiver requests.

(ii) Petitions for Reconsideration: On July 29, 2006, CompTel, T-Mobile and the NENA/VON Coalition filed Petitions for Reconsideration and/or Clarification of the VoIP E911 Order. The CompTel Petition focused on enterprise VoIP providers, specifically requesting clarification that IVPs providing non-nomadic T1 equivalent services that already include E911 need not comply with the obligations set out in the FCC’s VoIP E911 Order. The NENA/VON Coalition Petition requests clarification on a variety of issues including: (1) Master Street Address Guide validation, and (2) the use of contractual limitations disallowing the customer from moving their VoIP service. Finally, T-Mobile’s petition focuses on obtaining ALI information automatically, as opposed to the requirement that customers provide such information (i.e., through the Registered Location requirement). The FCC has not ruled on any of these petitions to date.

44 Id. 20 FCC Rcd at 10257, para. 24.
45 Id.
46 Id.
47 The VoIP E911 Order also requires IVPs to obtain location information from their customers; to specifically advise every subscriber of the circumstances under which E911 service may not be available, and to obtain and keep a record of affirmative acknowledgement by every subscriber of having received and understood this advisory.
4. Animal, Vegetable, or Mineral? Cable Internet Services

Over the past several years, the demand by American businesses and consumers for high-speed Internet access has resulted in the increasing popularity of data delivery via broadband. Competition to serve this demand, especially in the residential market, has largely developed between cable TV companies providing cable modem services and incumbent local exchange telephone companies (“ILECs”) providing xDSL services. ILECs deliver xDSL services using special electronic equipment located in central switching offices, with xDSL modems attached to the customer’s computer, to provide high capacity bandwidth over the ordinary copper facilities (the local loop) that carry plain old telephone services (“POTS”) between the ILECs’ central office and the customer’s home. Similarly, cable modems provide high-speed access to the Internet over the cable television company hybrid fiber optic-coaxial networks that traditionally have been used only for video program delivery. Like xDSL services, cable modem services utilize an existing connection into the home (in this case, coaxial cable) in combination with electronics at the customer’s premises (the cable modem) and additional equipment at the cable company’s offices to offer high-capacity bandwidth to residential customers.

At the time these two platforms emerged, the FCC regulated telephone company xDSL services under the Computer Inquiry framework pursuant to Title II of the Communications Act. Under the FCC’s longstanding Computer II and Computer III rules, local exchange carriers (“LECs”) have been able to provide Internet access and other information services over their own facilities provided that they make the underlying services available to independent ISPs on a nondiscriminatory basis.\(^4^9\) The FCC, however, did not immediately classify cable broadband services upon their emergence in the commercial marketplace. As a result, cable broadband services and facilities became the subject of a nationwide dispute between the owners of these facilities (the cable companies) and alternative Internet service providers who sought access to those facilities to offer their brand of Internet access—in a similar manner to which they had access to the telephone company’s facilities and xDSL services. The resulting disputes sparked the FCC to examine the classification of cable broadband, but also to revisit the classification of telephone (or wireline) broadband Internet services. This examination centers first on the FCC’s regulatory classification of cable broadband Internet service—is it a telecommunications service animal, an information service vegetable, or a cable service mineral? The FCC’s cable broadband classification, and the outcome of the battle over the FCC’s classification in the courts then predetermined the outcome of the FCC’s parallel inquiry into the proper classification for telephone company broadband services.

(a) Regulatory Background

Cable modem Internet access is usually provided by cable operators regulated under Title VI of the Communications Act.\(^5^0\) The principal competitors to cable Internet service, telephone companies, are regulated under Title II of the Communications Act.\(^5^1\)

Pronounced regulatory differences between Title II and Title VI exist, including that Title VI cable operators are not subject to interconnection and unbundling obligations while Title II LECs are subject to some or all of these obligations of the 1996 Act. In fact, Title VI cable operators are expressly exempt from common carriage obligations, including the duty not to unreasonably discriminate among customers.\(^5^2\)

These regulatory differences allow cable operators to provide Internet access exclusively through one ISP, often an affiliate of the cable operator itself. Not surprisingly, the ILECs are anxious to achieve regulatory parity by either imposing equally burdensome common carrier open access obligations on cable operators or being relieved of such obligations themselves. At the same time, competing ISPs are eager to reach customers over the cable company’s own broadband facilities. In light of the FCC’s refusal to require open access, the fight between cable operators and independent ISPs moved into various courts beginning in 1999, where, among other issues, the regulatory classification of cable Internet service was considered.


\(^5^0\) Cable operators provide “cable services,” which the Communications Act defines as: “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” 47 USC §522(6).

\(^5^1\) See Section (h) infra for a discussion of the FCC’s current regulatory scheme regarding broadband Internet service provided by telephone companies (wireline broadband services).

\(^5^2\) See 47 USC §541(c).
(b) Part I: The Ninth Circuit: *AT&T v. City of Portland*

The first legal challenge played out in the United States District Court for the District of Oregon. The City of Portland had imposed an open access requirement as a condition of approving the transfer of control of TCI’s Portland cable franchises to AT&T. AT&T rejected this condition, and as a consequence of Portland’s subsequent denial of the transfer, AT&T brought an action in federal district court seeking, among other things, a declaratory ruling that the open access requirement violated the 1996 Act and that Portland could not require open access to AT&T’s cable modem platform by unaffiliated providers of Internet and online services.

After the district court upheld Portland’s authority to impose an open access mandate, AT&T appealed the decision to the United States Court of Appeals for the Ninth Circuit, which reversed the lower court’s ruling by finding that the Communications Act preempted state and local authorities from imposing an open access requirement. The Ninth Circuit specifically ruled that a cable ISP offers two separate services bundled together: (1) a telecommunications service “pipeline,” and (2) the Internet information service transmitted through that pipeline. As a result of this dual classification, the Court held that the City of Portland was precluded from conditioning a cable franchise on, or otherwise regulating, a cable provider’s provisioning of telecommunications.

(c) Part II: The Fourth Circuit: *MediaOne v. Henrico County*

A virtually identical case arose in Henrico County, Virginia (the “County”). In this case, however after the County refused to grant the transfer of control of a cable franchise to AT&T, AT&T prevailed at the district court on the grounds that the 1996 Act prohibited the County’s regulation of the cable company’s telecommunications services, and the United States Court of Appeals for the Fourth Circuit affirmed. Like the Ninth Circuit, the Fourth Circuit held that the cable modem platform, when separated from the Internet service component of the ISP offering, “is a telecommunications facility because it is a pipeline for telecommunications, that is, for ‘the transmission . . . of information of the user’s choosing, without change in the form or content.’ ”

(d) Part III: The Eleventh Circuit and Supreme Court Pole Attachment Cases

The third act of this saga involved the United States Court of Appeals for the Eleventh Circuit and the Pole Attachment Act (“PAA”). As part of the 1996 Act, Congress amended the PAA, first passed in 1978, to broaden its application and scope to require pole owners to provide nondiscriminatory access to cable companies and telecommunications carriers.

In 1998, the FCC adopted rules implementing the 1996 amendments to the PAA, and determined that the PAA covered attachments for Internet service provided on a commingled basis by cable operators. These rules were challenged by power companies on the grounds that the rules exceeded the FCC’s authority under the PAA. The Eleventh Circuit concluded that Internet service is not covered by the PAA because such service does not fit within the definition of either a cable or telecommunications service. Although an open access obligation was not at issue, by holding that Internet service is not entitled to nondiscriminatory access to poles under the PAA, the Court’s opinion could have provided support for the premise that such services are information services rather than cable or telecommunications services.

The Supreme Court granted *certiorari*, and in *National Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.* ruled that the FCC’s interpretation regarding attachments for Internet service provided on a commingled basis by

53 *See AT&T Corp. v. City of Portland*, 3 ILR (P&F) 60, 43 F Supp 2d 1146 (D Or 1999) (“AT&T-Portland”).

54 *AT&T Corp. v. City of Portland*, 5 ILR (P&F) 466, 216 F3d 871 (9th Cir 2000).

55 *See 47 USC §541(b)(3). 47 USC §541(b)(3)(D) provides that “a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, franchise renewal, or a transfer of a franchise.”

56 *See MediaOne Group, Inc. v. County of Henrico, Virginia*, 5 ILR (P&F) 541, 97 F Supp 2d 712 (ED Va 2000).


58 *Id. at 363, citing the federal definition of telecommunications, at 47 USC §153(43).*

59 In fact, challenges were lodged in various courts, some of which raised only constitutional issues. These prior proceedings are not discussed here, as they have not led to any judicial decisions that address the substance of the PAA or the FCC’s PAA interpretations as it applied to Internet service.

60 *Gulf Power Co. v. FCC*, 5 ILR (P&F) 337, 208 F3d 1263 (11th Cir 2000).

61 9 ILR (P&F) 478, 534 US 327.
cable operators was reasonable. Notably, the Court made no attempt to determine whether cable modem service is a

cable service, a telecommunications service, or an information service.\textsuperscript{62}

(e) The FCC Joins the Debate

As a likely result of the various and inconsistent approaches taken by the Fourth, Ninth and Eleventh Circuits, as

well as the prodding from the Supreme Court, on March 14, 2002, the FCC adopted a Declaratory Ruling and

NPRM classifying cable Internet services as interstate “information services” subject to Title I of the Act.\textsuperscript{63}

In the \textit{Cable Broadband Order}, the FCC explained that a cable Internet service is the offering of Internet access,

which “combines the transmission of data with computer processing, information provision, and computer

interactivity, enabling end users to run a variety of applications.” Such capabilities are consistent with the definition

of an information service. As it had done in earlier proceedings, the FCC held that regulation of information

services are governed by Title I of the Act, not Title II, which governs regulation of common carrier services, or

Title VI, which governs regulation of cable services. The FCC held that although cable Internet services transmit

the data processing capabilities of information services via “telecommunications,” the service itself is not an

offering of “telecommunications services.” Consistent with its previous ruling that information services are not

inherently telecommunications services simply because they are offered via telecommunications, the FCC found

that the “telecommunications” component is integrated with the cable modem service and its other capabilities. As

such, cable Internet service is not the offering of telecommunications services to consumers.

More importantly the FCC explained that the “telecommunications” component of cable broadband services,

because it was telecommunications” but not “telecommunications service,” was private carriage. Thus, cable

companies were under no obligation to provide competing ISPs access to the cable facilities for provision of their

own Internet service—at any price. This contrasted with the FCC’s then treatment of wireline broadband Internet

services, which were subject to the FCC’s \textit{Computer Inquiry} rules that obligated facilities based wireline carriers

offering broadband Internet service—such as xDSL—to provide the telecommunications component of their

Internet services on a common carriage basis to nonaffiliated ISPs such as EarthLink and AOL.

It was then no surprise that shortly after adoption of the \textit{Cable Broadband Order}, the FCC issued an NPRM

seeking comment on the proper regulatory classification of wireline broadband Internet services.\textsuperscript{64} The \textit{Wireline

Broadband NPRM} tentatively concluded that the FCC should harmonize its classification of wireline broadband

service with its classification of cable broadband service. The FCC, however, took no action on the \textit{Wireline

Broadband NPRM}, while the \textit{Cable Broadband Order} was on review in the Ninth Circuit.

(f) The Saga Comes Full Circle—Back to the Ninth Circuit

Numerous parties appealed the \textit{Cable Broadband Order}, and the appeals were consolidated in the Ninth Circuit.

In October 2003, in \textit{Brand X Internet v. FCC},\textsuperscript{65} a 3-judge panel of the U.S. Court of Appeals for the Ninth Circuit

vacated the \textit{Cable Broadband Order}. Invoking \textit{stare decisis},\textsuperscript{66} the Court relied only on its decision in \textit{AT&T-Portland}

and offered no analysis of the FCC’s order.

(g) \textit{Brand X}—The Final Say

The cable companies, through their trade association, the National Cable and Telecommunications Association

(“NCTA”) and the FCC, through the Solicitor General, sought \textit{certiorari} from the Supreme Court. The Court

agreed to hear the case and, reversed the Ninth Circuit thus affirming the FCC’s decision to classify cable

broadband service as a single offering of information service without a separate “telecommunication service”

component.\textsuperscript{67}

\begin{footnotes}
\begin{enumerate}
\item Justice Thomas, joined by Justice Souter, wrote a separate dissenting opinion wherein he expressed frustration that the

FCC has not classified cable Internet service. Justice Thomas indicated that he would have remanded the case to the FCC to

conduct further proceedings.

\item Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185,


\item See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed


\item Brand X Internet Services v. FCC, 14 ILR (P&F) 575, 345 F3d 1120 (9th Cir 2003).

\item Latin for “to stand by things decided.” \textit{Stare decisis} is essentially the doctrine of precedent. Generally, courts cite to

\textit{stare decisis} when an issue has been previously brought to the court and a ruling already issued.

\end{enumerate}
\end{footnotes}
In an important clarification of administrative law and the FCC’s ability to interpret the Communications Act, the Court rejected the Ninth Circuit’s application of the principle of stare decisis. The Court applied the Chevron doctrine, which provides that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.” Chevron thus “requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.” Chevron requires a two-step analysis. First, the reviewing court determines “whether the statute’s plan terms directly address the precise question at issue.” Second, if the statute does not address the issue precisely the reviewing court defers to the agency interpretation “so long as the construction is “a reasonable policy choice for the agency to make.”

Because the dispute in Brand X centered on provisions of the Communications Act, the Supreme Court started with the Chevron analysis. But the Ninth Circuit’s opinion below placed the FCC and the Brand X Court in a unique position. Because of the FCC’s initial reluctance to wade into the open access debate in the late 1990’s, the courts were left to fill the Act’s statutory gap. The question in Brand X was whether once the courts filled that statutory gap what deference is owed an agency’s subsequent attempt to fill that statutory gap differently than the previous reviewing court.

The Supreme Court observed that because the Ninth Circuit never found that the statute was unambiguous and foreclosed any other reading of the statute but its own, the FCC’s subsequent interpretation in the Cable Broadband Order was owed deference, and should be upheld as long as it was reasonable. This explanation thus preserves the FCC’s power under the Act to interpret ambiguous provisions in the statute on its own timetable. Rather than rush to judgment in the open access debate, the FCC’s “wait and see” approach was vindicated, as it was able to pursue its policies even in the face of conflicting judicial construction of the statute.

The provision of the Act at issue in Brand X was the definition of “telecommunications service.” ISPs argued that cable modem services that use telecommunications to provide high-speed broadband Internet services to consumers consisted of two separate offerings: 1) pure transmission that is statutorily a “telecommunications service” and 2) Internet service, which is an information service. Because, according to the ISPs, the cable modem service includes an offer of telecommunications to the public for a fee, it was a “telecommunications service” subject to regulation under Title II. If Title II applied, so did the FCC’s Computer II requirement that providers of facilities-based information services provide the telecommunications component of their services to unaffiliated providers on just reasonable and nondiscriminatory terms, conditions and prices. The ISPs argued that those same obligations should apply to facilities based providers of cable modem services. The question before the court was thus whether the FCC properly applied the statutory definition of telecommunications service in determining that cable modem services are information services that necessarily use telecommunications but do not include a separate offer of telecommunications to the public.

Applying Chevron, the Supreme Court first examined whether the statutory term “telecommunications service” unambiguously required that cable modem service include a separate offering of telecommunications services. The Court found the statute was ambiguous on this point.

The Court determined that the FCC’s interpretation of the term “telecommunications service” was reasonable and that its decision to classify cable broadband service as a single integrated offering of information services rather than containing an offer of information service and a separate offer of telecommunications service was reasonable. The Court rejected the ISPs claim that the 1996 Act’s definitions of information service and telecommunications service mandated the continued regulatory scheme of requiring facilities based providers to offer the telecommunications components of their information service offerings separately from the information service. The Court explained that it was “improbable that the Communications Act unambiguously froze in time the Computer II

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69 Brand X, 545 US at 980.
70 Id.
71 Id. at 985 (citing Chevron, 467 US at 843).
72 Id.
73 Brand X, 545 US at 985.
74 Id. at 997.
75 Brand X, 545 US at 988.
treatment of facilities based information-service providers.” Overall, Brand X was a validation for the FCC, an important victory for the cable companies and a stinging defeat for ISPs and the ILECs.

(h) The Wireline Broadband Order—Back to the FCC

Within weeks of the Brand X opinion, the FCC adopted an order in the long stagnant wireline broadband proceeding. In the Wireline Broadband Order, the FCC adopted its tentative conclusion first reached in 2002 in the Wireline Broadband NPRM that wireline broadband service, like cable broadband service was an integrated offering and contained no separate offering of telecommunications service. The FCC evaluated the appropriate legal framework for wireline broadband services and determined that continuing to apply the separate offering and tariffing requirements of Computer II was no longer justified. The FCC explained that it is initial Computer Inquiry safeguards were predicated on the assumption that the local telephone company network was the sole source of the inputs need to competing information services. However, this assumption did not apply to broadband where “broadband Internet access services have never been restricted to a single network platform provided by the incumbent LECs.”

The FCC concluded that the current competition between cable companies and xDSL providers coupled with the emergence of third platforms such as Wi-Max, Broadband over Powerline, satellite and 3G mobile wireless, would discipline any potential anti-competitive conduct. Because the FCC found that “many consumers have a competitive choice for broadband Internet access services,” it no longer saw a need to compel the telephone companies to provide nondiscriminatory access to unaffiliated ISPs. The FCC also found that saddling wireline providers with a compulsory sharing obligation when cable modem services, which had a greater share of the market and were subject to none, would retard further investment in wireline broadband networks. In fact, the FCC predicted that without a regulatory compulsion to offer wholesale transmission services to unaffiliated ISPs the RBOCs would offer more customized offering to ISPs allowing unaffiliated providers to offer wireline broadband Internet service to ends users.

The FCC clarified, however, that this classification does not apply to traditional transmission services that the ILECs have provided for years but is limited to services that provide Internet access. As the FCC explained, the Wireline Broadband Order does not apply to “stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have traditionally used for basic transmission purposes.”

In relieving facilities-based wireline broadband Internet providers of their Computer II obligations, the FCC did, however afford providers the ability to continue offering stand alone transmission for use in wireline broadband services on either a common carriage or private carriage basis. Those providers offering transmission on a

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76 Id. at 996.
78 Id. at 14875, para. 41. (The Commission eliminated all Computer Inquiry obligations applicable to wireline broadband Internet services, including the more stringent CEI and ONA obligations applicable to the BOCs that few commenters sought to retain. The core dispute largely centered on whether wireline broadband providers that own their facilities should be required to make access to those transmission facilities available on just reasonable and nondiscriminatory terms and conditions.).
79 Id. at 14879, para. 47.
80 Id.
81 Wireline Broadband Order, 20 FCC Rcd at 14887, para. 64 (FCC found that “increasing competition among facilities-based broadband providers . . . will sustain and increase competitive choice among broadband providers and Internet access products.”).
82 Id.
83 See id. at 14887, paras. 65-73. Under Chairman Powell and now Chairman Martin, the FCC has made promoting ILEC investment in wireline broadband networks a central objective.
84 Id. at 14889, paras. 87-88.
85 Id. at 14860, para. 9.
86 Id. at 14899, para. 86.
The FCC took additional action aimed at leveling the competitive playing field for xDSL service. The FCC removed the obligation for wireline broadband providers to contribute to federal universal service on the telecommunications portion of their wireline broadband Internet services. The Wireline Broadband Order delayed the effect of this relief until late 2006, providing the FCC with time to replace the substantial revenues that would be lost.

While both wireline and cable broadband Internet services will in most cases be exempt from Title II, the FCC did not entirely abdicate its role. The Wireline Broadband Order found that the Commission could impose similar substitute regulations under Title I, potentially addressing Network Reliability and Interoperability, USF and NANPA funding, slamming, truth-in-billing, CPNI/privacy, discontinuance rules, public safety and disability access. For example, at the same time the FCC issued the wireline broadband order, the FCC also determined that wireline broadband services must comply with CALEA. It would not be surprising, however, that any FCC effort to reimpose Title II type regulation on wireline broadband and Internet services would meet with stiff resistance in the courts.

In the meantime, two ILECs, Bell South and Verizon, filed petitions with the FCC requesting that the FCC forbear from applying Title II and Computer Inquiry rules to their broadband services. BellSouth withdrew the petition before the FCC made a final decision on the filing. However, the FCC allowed the Verizon petition to go into effect by declining to act on the petition within the statutory timeframe. By allowing the Verizon petition to go into effect, the Commission relieved Verizon of rate regulation and all other Title II regulation (such as interconnection, universal service, and other common carrier requirements) on the company’s broadband services. CompTel, Sprint-Nextel, and others have sought judicial review of the FCC’s decision. The case is pending with the D.C. Circuit.

(i) Is it Really Over?

Numerous parties, including ISPs and CLECs have appealed the both the Wireline Broadband Order and the Verizon Forbearance Notice and Congress is considering legislation to rework the nation’s communications laws. Questions abound whether the courts will require the FCC to revisit the Wireline Broadband Order or whether Congress will tinker with the law and render the classification questions the FCC struggled with in the first half of the decade moot.

The FCC’s decisions to classify broadband services outside the scope of Title II leave unanswered the question of what regulatory protections will govern the broadband future. If ILECs are not compelled to offer broadband transmission on a common carrier basis in compliance with the core nondiscrimination safeguards in Title II, many stakeholders fear that the large telephone companies and cable companies will use their control of the dominant broadband networks to stifle the open and innovative Internet that was made possible by the existence of common carrier regulation and the FCC’s Computer Inquiry regime.

On the other hand, those opposed to further FCC regulation, and those sympathetic to the interests of the cable and local telephone companies that own the networks, argue that competitive market forces will discipline anti-

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87 Id. at 14901, para. 90.
88 Wireline Broadband Order, 20 FCC Rcd at 14915 para. 113. See also, Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (FCC imposed interim rule requiring IVPs to contribute to Federal Universal Service, in part, purportedly to replace USF contributions formerly required of wireline broadband providers.).
89 Id. at 14929, paras. 145-159.
91 See Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 USC §160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004) and Petition of the Verizon Telephone Companies for Forbearance under 47 USC §160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (filed Dec. 20, 2004).
competitive conduct. The FCC’s broadband orders further suggest that its current policies are informed by the nascent stage of the broadband market. As the market and competition take shape, the FCC conceivably could step in to correct markets abuses to the extent they occur, presumably under Title I. But as Justice Scalia noted in his dissent in Brand X, the scope of the FCC’s ancillary authority is not unlimited.\(^\text{93}\) Regardless, the FCC’s deregulation of broadband Internet service merely sets the table for the next major communications policy battle: net neutrality.

Stakeholders that are fearful of the anticompetitive tendencies of dominant providers and the historical monopoly practice of the ILECs, have urged the FCC and Congress to adopt a policy of “Net Neutrality” to ensure that consumers enjoy the protections that used to be guaranteed by the principles of common carriage. In response to those concerns, the FCC issued a policy statement simultaneously with the release of the Wireline Broadband Order, laying out a net neutrality policy governing broadband Internet providers.\(^\text{94}\) (That policy statement, which by its terms is unenforceable, was widely reported as a compromise statement issued simply to secure the two votes of democratic commissioners on the Wireline Broadband Order.)

This Network Neutrality Policy statement contained principles designed to “preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age.” This statement is an important step forward for net neutrality advocates, but likely was drafted to be vague and unenforceable in order to avoid challenge by ILECs and cable companies.\(^\text{95}\) The statement provides that:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.

**B. The Jurisdictional Classification of Advanced Services: Local, Intrastate, or Interstate?**

Just as the FCC is currently engaged in the difficult task of trying to classify the statutory nature of the Internet and other forms of advanced services, it also is preoccupied with the jurisdictional characterization of these services. That is, are these services to be considered local, intrastate, or interstate?

This characterization is significant for reasons beyond deciding what regulatory body may regulate the services. Interstate services are subject to the FCC’s jurisdiction, and local exchange carriers that terminate interstate service are generally entitled to access charge payments. By contrast, intrastate traffic is subject to state commission jurisdiction. Within the state commission’s jurisdiction, carriers terminating local exchange traffic are generally entitled to reciprocal compensation payments while carriers terminating non-local traffic (i.e., long distance) are generally entitled to access charge payments. Significantly, access charge rates often differ substantially between federal and state jurisdictions, and often both differ substantially from reciprocal compensation rates. As a result, whether a particular service is classified as interstate, intrastate, local or long distance can have profound economic and legal implications. For this reason, ISPs, ILECs, CLECs, and other advanced service providers have focused significant attention on the jurisdictional character of their services.

\(^{93}\) Brand X, 545 US at 1014, n.7 (J. SCALIA Dissent) (expressing reasons “to doubt whether [the FCC] can use its Title I powers” to regulate broadband services classified as Title I services).


\(^{95}\) The FCC, however made compliance with its Policy Statement a condition of its approval of the SBC/AT&T, Verizon/MCI and AT&T/BellSouth Mergers. SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18414 App. F (2005); Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18561 App. G (2005), BellSouth Corp. and AT&T, Inc. Applications for Approval of Transfer of Control, WC Docket No. 06-74, News Release (Dec. 29, 2006).
Not long before passage of the 1996 Act, the first easy-to-use Internet browser, Netscape Navigator, became widely available for free and helped revolutionize Internet access. Soon thereafter, almost anyone with a telephone line, modem, and a personal computer was able to access information delivered from around the world. Around the same time as passage of the 1996 Act, major ISPs began to take full advantage of their safe-harbor access charge exemption and began offering end-users flat rate access to the Internet. The combination of flat rate dial-up access and user-friendly Internet browsers resulted in an explosion of Internet traffic carried by the PSTN.

Traffic on ISP modem lines is almost exclusively inbound, with hold times that tend to far exceed those of regular voice calls. Recognizing that this type of traffic could generate considerable reciprocal compensation revenue, CLECs began to enter into partnerships with the many new dial-up ISPs.

Over time, ILECs realized that the balance of reciprocal compensation payments heavily favored these CLECS. By April 1997, the amounts ILECs owed to CLECs had increased significantly, and many ILECs refused to make these payments, arguing that ISP-bound traffic was jurisdictionally interstate in nature and therefore not subject to reciprocal compensation.

In 1997, this issue was presented to the FCC for resolution when the Association for Local Telecommunications Services (“ALTS”) requested that the FCC declare all local traffic, including traffic to ISPs, subject to reciprocal compensation. In February 1999, the FCC issued the ISP Declaratory Ruling finding that ISP-bound traffic was jurisdictionally mixed but largely interstate in nature. The FCC also held that in the absence of any FCC rules, states were free to impose intercarrier compensation obligations as they deem appropriate. Nevertheless, according to the FCC, its own precedent suggested that reciprocal compensation was owed for ISP-bound traffic because ISP-bound traffic had always been treated as local traffic. The FCC also issued a NPRM in order to establish a federal rule on the topic.

Both ILECs and CLECs appealed the ISP Declaratory Ruling, which was vacated and remanded by the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit found that the FCC’s conclusion that calls to ISPs are not local calls and, therefore, not subject to the payment of reciprocal compensation, was not supported by a reasoned analysis. Specifically, the D.C. Circuit held that the FCC did not provide any reasoned basis for its conclusion that the end-to-end analysis applied by the FCC for determining the jurisdiction of calls was applicable to the determination of whether calls are local for purposes of reciprocal compensation under the Telecom Act. The D.C. Circuit further stated that the FCC did not satisfactorily explain why “an ISP is not, for the purposes of reciprocal compensation, simply a communications-intensive business end user selling a product to other consumers and end users.” In the absence of a reasoned analysis, the D.C. Circuit vacated the rule and remanded it to the FCC.

Thereafter, the FCC reopened the intercarrier compensation proceeding in order to resolve the ISP traffic dispute. On April 27, 2001, the FCC issued an order establishing a new intercarrier compensation regime for ISP-bound traffic with capped rates above a fixed traffic exchange ratio.

The ISP Remand Order held that ISP-bound traffic was “information access” as that term is used in Section 251(g) of the Communications Act and that such provision exempted the class of traffic from the requirements of reciprocal compensation for the transport and termination of telecommunications. Pursuant to its Section 201 authority, the FCC established an interim regime for intercarrier compensation for ISP-bound traffic.

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97 See Bell Atl. Tel. Cos. v. FCC, 5 ILR (P&F) 38, 206 F3d 1 (DC Cir 2000).
99 The key points to this interim regime are as follows:

Rebuttable Presumption. Traffic above a ratio of 3:1 (terminating minutes to originating minutes) is subject to a rebuttable presumption that it is ISP-bound traffic.

Compensation Rates. Compensation for ISP-bound traffic (e.g., traffic above a ratio of 3:1 will be capped at $.0015 per minute of use (“MOU”) for 6 months; at $.001/MOU for 18 months; and at $.0007/MOU thereafter until the FCC issues a new order.

Growth Ceiling. There is a 10% growth ceiling on compensable ISP-bound minutes on a contract-by-contract basis that applies through 2003.
The ISP Remand Order was appealed, and in May 2002, the D.C. Circuit ruled that Section 251(g) of the Communications Act was not susceptible to the FCC’s reading of it.\textsuperscript{100} Instead, Section 251(g) merely preserved existing interconnection restrictions and obligations established by the 1982 AT&T Consent Decree.\textsuperscript{101} Because there were no obligations relating to intercarrier compensation for ISP-bound traffic in the AT&T Consent Decree, Section 251(g) could not apply in this context. The D.C. Circuit, however, did not vacate the ISP Remand Order. The Court believed that the FCC may have the authority to impose its interim compensation regime, perhaps under Section 251(b)(5) of the Communications Act. The D.C. Circuit made no ruling on the legality of the interim compensation regime, so it has been neither validated nor invalidated by the Court.

For five years the FCC has done nothing regarding the remand instructions from the D.C. Circuit. Apparently, because the interim compensation regime was left in place by the court, the FCC felt no urgency to provide a legal rationale for a regulatory regime that accomplishes the FCC’s main objective of strictly limiting intercarrier compensation obligations for ISP-bound traffic. The FCC has, however, modified aspects of the interim compensation regime. In the Core Decision, the FCC eliminated the growth caps and the new market rule.\textsuperscript{102} Prior to the Core Decision, the new market rule provided that when a new carrier entered a market or an existing carrier expanded into a market it previously had not served, the ILEC and the other carrier were required to exchange ISP-bound traffic on a bill-and-keep basis provided the ILEC adopted the FCC’s regime. In addition, growth caps imposed a cap on the total ISP-bound minutes of use for which a LEC may receive compensation. The FCC determined these rules were no longer necessary because of the declining usage of dial-up ISP services.

On April 27, 2001, at the same time it released the ISP Remand Order, the FCC released the Intercarrier Compensation NPRM to begin the process of replacing the varying rates among reciprocal compensation, access charges and intercarrier compensation for ISP-bound traffic, with a unified intercarrier compensation regime.\textsuperscript{103} In the Intercarrier Compensation NPRM, the FCC sought comment on “the feasibility of a bill-and-keep approach for such a unified regime.” The FCC has encouraged the telecom industry to develop an acceptable solution and has sought and received proposals from various groups of ILECs, CLECs, CMRS carriers and telecom associations who have been meeting over the past several years in an effort to establish a compensation regime. Several proposals were presented to the FCC in preliminary form, including proposals by the Cost-Based Intercarrier Compensation Coalition, the Expanded Portland Group, and the Intercarrier Compensation Forum. None of these proposals

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\textbf{ILEC May Choose Not to Adopt FCC Regime.} The federal compensation regime for ISP-bound traffic applies only if an incumbent LEC offers to exchange all local traffic at the applicable federal capped rate. ILEC election is on a state-by-state basis.

\textbf{New Entrants.} For CLEC expansion into new states, all ISP-bound traffic is to be exchanged on a bill-and-keep basis. Non-ISP-bound traffic will be subject to reciprocal compensation.

\textbf{State Commission Authority.} The ISP Remand Order states that it does not preempt state commission decisions issued before the effective date of the Order. State commission authority over compensation for ISP-bound traffic is preempted upon the effective date.

\textsuperscript{100} WorldCom v. FCC, 11 ILR (P&F) 358, 288 F3d 429 (DC Cir 2002), cert. den. 538 US 1012 (2003).

\textsuperscript{101} The “AT&T Consent Decree” refers to the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia. AT&T provided the bulk of telecommunications services (local, long distance and international) and equipment in the United States until January 1, 1984 when, pursuant the Consent Decree, AT&T divested itself of the Bell Operating Companies (“BOCs”) that provided local exchange service. This resulted in seven restructured independently owned and operated Regional Bell Operating Companies (“RBOCs”), which provided local exchange services and were allowed to sell customer premises equipment, but were restrained from providing interexchange service, manufacturing telephone equipment, providing information services, and, except with court approval, engaging in other unregulated non-telecommunications businesses.


achieved a broad industry consensus and none embraced the FCC’s proposed bill-and-keep approach for all intercarrier compensation.

In July 2006, the ILEC-dominated “Group of 11,” led by AT&T and an alliance of 326 rural telecom carriers, filed with the FCC the “Missoula Plan” (the “Plan”) to reform intercarrier compensation, modify interconnection rules, and develop new revenue-neutral replacement mechanisms for the ILECs.104 The Plan is the second major attempt at achieving an industry consensus plan. The Plan is opposed by most of the non-ILEC carriers, including CLECs, CMRS providers, cable companies and VoIP providers, some mid-sized rural LECs, and most utility consumer advocates.

The Plan would reduce the access charges and reciprocal compensation charges that telecommunications carriers pay to terminate their calls on ILEC networks; although, there is no assurance that these reductions would be passed through to consumers. Carriers are assigned to one of three “tracks” that determine the nature and pace of intercarrier compensation reform. All RBOCs and CLECs are in Track 1, Track 2 includes mid-sized ILECs, and Track 3 includes the smaller rural ILECs. Track 1 carriers would reach a uniform rate for terminating access and non-access in Year three of the plan at a rate of $0.0007 per minute of use (“MOU”), to be reduced to $0.0005 per MOU in year four. However, in year four, the originating access charges imposed by RBOCs could remain as high as $0.0045 per MOU. Further, in order to achieve revenue neutrality for ILECs, the Plan would cause a significant increase in the Universal Service obligations imposed on consumers to fund a new “Restructure Mechanism” to replace revenue lost by ILECs from a decrease in access charges. In addition, the subscriber line charge (“SLC”) caps would be permitted to increase over four years before the FCC is required to reevaluate these caps. The Plan also impose increased transit and transport charges on CLECs and other providers for exchanging traffic with ILECs.

The FCC has invited public comments on the Plan, and this likely will be the start of a lengthy analysis and debate of the merits of the Plan. The FCC already has been considering these issues for five years, an indication that it is cannot expected to take prompt action on this proposal.

V. Conclusion

The regulatory policies governing the Internet and those traditional services that have converged with the Internet are of tremendous significance to both the telecommunications industry as well as consumers. Given the current unsettled state of affairs, there is little doubt that matters in this area will continue to develop rapidly and the rules of the road will continue to change as the FCC struggles to keep up with the robust and ever changing telecommunications industry.

[Last updated January 2007.—Ed.]

104 Letter from Tony Clark, N. D. Public Service Commission et al. to Kevin Martin, FCC, CC Docket 01-92 (filed July 24, 2006). The Plan is supported by AT&T, Bell South, Cingular Wireless, Commonwealth Tel. Co., Epic Touch, Global Crossing, Iowa Telecom, Level 3, Madison River Comm., and The Rural Alliance (which includes over 300 independent and rural telecom carriers). Verizon and Qwest are noticeably absent as supporters, as were the wireless, cable, VoIP, and CLEC industries.